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IN THE

Supreme Court of the United States

E & L CONSULTING, LTD.,
dba C.B.C. LUMBER, CO., *et al.*,

Petitioners,

v.

DOMAN INDUSTRIES LIMITED, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS DOMAN INDUSTRIES LIMITED AND EACOM TIMBER SALES LTD.

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QUESTION PRESENTED

Whether a complaint challenging an exclusive distributorship agreement under the Sherman Act must allege facts that support that such an agreement had a plausible adverse effect on competition marketwide.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioners are E&L Consulting, Ltd. d/b/a C.B.C. Lumber, Co. and C.B.C. Wood Products, Inc. Respondents are Doman Industries Limited, Eacom Timber Sales Ltd., and Sherwood Lumber Corp.

Respondent Eacom Timber Sales Ltd. is a wholly owned subsidiary of Respondent Doman Industries Limited ("Doman"). Doman has no parent corporation, and no publicly held corporation owns ten percent (10%) or more of Doman's stock.

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals, Second Circuit, is reported at 472 F.3d 23. The opinion of the United States District Court, Eastern District of New York (Trager, J.), is reported at 360 F. Supp. 2d 465.

JURISDICTION

The order of the Second Circuit denying plaintiffs' petition for rehearing or rehearing en banc was entered on February 20, 2007. The petition for writ of certiorari was filed on May 18, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The relevant statutory provisions are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, as well as Fed. R. Civ. P. 12(b)(6).

STATEMENT

For fourteen years, petitioners E&L Consulting, Ltd. and C.B.C. Wood Products, Inc. (collectively, "E&L") served as the exclusive sales agent for respondents Doman Industries Limited and Eacom Timber Sales Ltd. (together, "Doman") in the distribution of Doman's green hem-fir lumber delivered to the Red Hook Port in Brooklyn, New York. In January 2004, Doman terminated its agreement with E&L, opting instead to sell its green hem-fir lumber directly to a reseller, rather than distributing it through sales agents. While E&L had hoped to become a reseller of Doman's lumber, Doman

instead entered into an agreement with respondent Sherwood Lumber Corp. ("Sherwood"). Disappointed by Doman's decision, E&L commenced an action in the United States District Court for the Eastern District of New York alleging, *inter alia*, numerous claims under the federal antitrust laws.

The district court conducted a detailed analysis of petitioners' amended complaint (Pet. App. 42-54) and properly concluded that E&L's allegations failed to state any claim. In particular, with respect to petitioners' purported antitrust claims, the district court found that the amended complaint failed to allege facts to support a finding of antitrust injury and did not define an economically meaningful relevant product market.[1] The court thus dismissed the amended complaint, holding that "[t]he conclusory and, at times, implausible nature of plaintiffs' allegations . . . are not sufficient to make out a claim under the antitrust laws, even at this early stage of the litigation." Pet. App. 33.

The Second Circuit, properly reviewing de novo the district court's grant of the Rule 12(b)(6) motion to dismiss, affirmed the judgment, stating that petitioners "have failed to allege facts that, if proven, would demonstrate harm to competition." Pet. App. 2. The Second Circuit observed that the purported restraint alleged by E&L, even if true, is not of a type that has been deemed so likely to harm competition that it will be found per se unreasonable. Petitioners' purported claims therefore were subject to review under the

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[1] Additionally, the district court noted that petitioners' claims were brought in violation of a stay order issued by the Canadian bankruptcy court overseeing Doman's reorganization.

rule of reason, which "seeks to determine if the alleged restraint is unreasonable because its 'anticompetitive effects outweigh its procompetitive effects.'" Pet. App. 8 (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990)). Because a claim subject to the rule of reason requires the claimant to demonstrate actual anticompetitive effects, the allegations supporting such a claim must set forth facts that plausibly support a finding of competitive harm. The Second Circuit correctly found that petitioners had failed to fulfill that basic requirement on the facts alleged, even if taken as true.

Specifically, as the Second Circuit observed, petitioners' amended complaint alleges no harm to competition that *results from Doman's relationship with Sherwood.* Pet. App. 9-10. Rather, petitioners claim to have been harmed by the "inflated" price of Doman's green hem-fir lumber, made possible by *Doman's purported market power. Id.* Petitioners, however, "do not assert that Doman's market share is somehow an illegal monopoly and seek no relief on that ground." Pet. App. 9. Thus, the price increase alleged by petitioners is "not a sufficient allegation of harm to competition caused by the exclusive distributorship, . . . because the alleged single source and price increase, even if monopolistic, is something Doman can achieve without the aid of a distributor." Pet. App. 10.

Upon the Second Circuit's denial of petitioners' request for rehearing, or a rehearing en banc, petitioners filed their petition for writ of certiorari. In a transparent effort to convince this Court to provide them with yet another opportunity to vent their commercial frustration, petitioners mischaracterize the Second Circuit's opinion and attempt to create the illusion of a conflict among the circuit courts of

appeal. Petitioners' attempt to manufacture a disputed question of law from allegations that set forth "nothing more than a run-of-the-mill exclusive distributorship controversy," Pet. App. 11 (quoting *Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 245 (2d Cir. 1997)), should be rejected summarily, and the petition should be denied.

REASONS FOR DENYING THE PETITION

I. PETITIONERS MISREPRESENT THE SECOND CIRCUIT'S HOLDING.

Petitioners ask this Court to grant certiorari to address "[w]hether an exclusive distributorship agreement can be challenged under the Sherman Act when it is alleged that the manufacturer has monopoly power over the supply of a unique product." The need to consider that question arises, petitioners claim, from a Second Circuit holding that "establish[s] a rule that exclusive distribution agreements are immune from liability under the Sherman Act." Pet. 3.

While petitioners assert that the Second Circuit has established a per se rule protecting exclusive distributorships, the Second Circuit's decision in this matter and others is clear: the Second Circuit has "never held that all exclusive arrangements are reasonable as a matter of law." Pet. App. 10. Rather, the Second Circuit has simply emphasized (and rightly so, as discussed more fully below) that "exclusive distributorship arrangements are *presumptively* legal." Pet. App. 10 (quoting *Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d at 245 (emphasis added)); *see also Geneva Pharms Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 506-07 (2d Cir. 2004) (same); *George Haug Co.*,

Inc. v. Rolls Royce Motor Cars, Inc., 148 F.3d 136, 140 n.1 (2d Cir. 1998) ("Exclusive distributorships are not per se authorized under the Sherman Act. Instead, we have heretofore held that an exclusive distributorship agreement, standing alone, is not illegal.").

Unlike a bright-line per se rule applicable to certain other purportedly commercial relationships, such as horizontal agreements to fix prices, a presumption of legality requires the court to apply the rule of reason, under which "the plaintiffs bear an initial burden to demonstrate that the defendants' challenged behavior 'had an actual adverse effect on competition as a whole in the relevant market.'" *Geneva Pharms. Tech. Corp.*, 386 F.3d at 506-07 (citing *Capital Imaging Assocs., P.C., v. Mohawk Valley Med. Assoc., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993)); *see also* Pet. App. 11. The opinion below accordingly (and properly) analyzes petitioners' allegations in light of that established presumption, and concludes that the amended complaint "simply does not allege . . . 'an actual adverse effect on competition as a whole . . .'" Pet. App. 11.

That conclusion comports with other Second Circuit authority, in which the court has permitted claims based on exclusive dealing arrangements that *could* plausibly harm competition. In *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.*, 386 F.3d 485 (2d Cir. 2004), for example, the Second Circuit *vacated* a grant of summary judgment and remanded for trial a Section 1 claim based on an exclusive dealing arrangement. As noted in the opinion below, and distinguishable from the facts alleged here, defendants in *Geneva* — parties to an exclusive supply arrangement — "were jointly involved in predatory practices designed to . . . deter[] entry by competitors." Pet. App. 10-

11 (citing *Geneva Pharms. Tech. Corp.*, 386 F.3d at 492-93). In *Geneva*, the parties used their agreement to prevent competition from entities that could have potentially manufactured competing products. Thus, "[t]he facts in *Geneva* . . . were quite different from the claim in a typical exclusive distribution case, like the present one, where it is alleged only that a monopolist manufacturer is trying to extend its monopoly into the distribution or sale of its product." Pet. App. 11. Indeed, petitioners' allegations do not support any claim that Doman and Sherwood engaged in predatory or otherwise illegal conduct to protect Doman's position in the market.

United States v. Visa U.S.A., Inc., 344 F.3d 229 (2d Cir. 2003), also supports the critical distinction between exclusive dealing arrangements that have no anticompetitive effect and those in which the parties might use such an arrangement to cause jointly an anticompetitive impact, thereby transforming a pure vertical restraint to a potential horizontal conspiracy. Plaintiffs in *Visa* challenged practices including, *inter alia*, two sellers' restrictions on the right of buyers to deal with the sellers' competitors.[2] The restrictions adversely affected competition by preventing competing sellers from selling their products *at all*. *Id.* at 243. The *Visa* court found, moreover, that the sellers' imposition of restrictions on the buyers harmed competition by "reducing overall card output and available card features, as well as by decreasing network services output and stunting price competition." *Visa U.S.A., Inc.*, 344 F.3d at 240 (internal quotations omitted). Here, Doman unilaterally determined to sell green hem-fir only to

[2] The court analogized Visa, Mastercard, American Express, and Discover to *sellers* in the network services market for general purpose cards, and the thousands of banks that issue the cards to *buyers*. *Visa U.S.A., Inc.*, 344 F.3d at 243.

Sherwood. Furthermore, the agreement between Doman and Sherwood does not prevent the product at issue (Doman green hem-fir lumber) from reaching the market, but affects only the means by which that product enters the market. Unlike in *Visa*, moreover, petitioners do not (and cannot) allege that the market structure for green hem-fir has changed from when *petitioners* were Doman's sole distributor. The circumstances here are thus unlike *Visa*; while petitioners may have suffered from a loss of business, competition in the marketplace has not been affected at all, as the Second Circuit's decision properly recognized. Pet. App. 2.

In sum, petitioners' position that the Second Circuit's decision precludes challenges to exclusive distributorships is without basis. The Second Circuit has consistently applied the correct analysis in examining exclusive distributor arrangements, and properly rejected the challenge to this one for what it is — a garden variety jilted distributor case.

II. NO CONFLICT EXISTS AMONG THE CIRCUITS.

Petitioners assert that "the Second Circuit has adopted a standard which is at odds with the holdings of other circuits, and the Supreme Court should determine whether claims under the Sherman Act challenging exclusive distributorship arrangements are still viable." Pet. 7. As clarified above, however, *see supra* Point I, the Second Circuit has adopted no new standard and, indeed, makes clear the circumstances in which exclusive dealing arrangements may be successfully challenged under the Sherman Act. The law of other circuits — including the decisions that petitioners cite as supposedly contrary authority — is in accord.

Petitioners principally rely on two cases to support their assertion of a conflict among the circuits: *Byars v. Bluff City News Co.*, 609 F.2d 843 (6th Cir. 1979) and *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690, 696-97 (7th Cir. 2006). Both *Byars* and *R.J. Reynolds*, however, are entirely consistent with the Second Circuit's decision below. As petitioners themselves acknowledge, *Byars* stands for nothing more than the uncontroversial proposition that "'[t]here are situations . . . where a refusal to deal as part of a vertical integration scheme is anticompetitive.'" Pet. 10 (quoting *Byars*, 609 F.2d at 861). Indeed, the Sixth Circuit's language supports the Second Circuit's decision in this case: "Franchisees and distributors which have been unilaterally terminated have discovered to their chagrin that ordinarily the law offers them no remedy absent proof that a conspiracy against them took place . . . . An agreement with another distributor to replace the terminated distributor does not count as a conspiracy." *Byars*, 609 F.2d at 854-55 (internal citations omitted).

Similarly, the Seventh Circuit's decision in *R.J. Reynolds* (which does not even address an exclusive dealing arrangement) is also consistent with the Second Circuit's decision. Petitioners cite the Seventh Circuit's observation, in dicta, that "'a retail cartel might be able to compensate a producer that organizes and coordinates their group . . . .'" Pet. 10 (quoting *R.J. Reynolds Tobacco Co.*, 462 F.3d at 697). Even if that had been the Seventh Circuit's *holding*, it has no bearing on the facts alleged here, as petitioners' allegations in no way allege a retail cartel. And even if such dicta were relevant to this matter, it in fact comports with more analogous Second Circuit authority. Specifically, as the Second Circuit recognized in *Geneva*, in which the defendants allegedly undertook predatory conduct to prevent

competition from other suppliers, there are circumstances in which exclusive dealing arrangements may run afoul of the antitrust laws. Were the Second Circuit called upon to evaluate a claim of exclusive dealing that involved a retail cartel — not present in this case — the analysis would presumably follow the reasoning set forth in *Geneva*.

In sum, the supposed "circuit split" that petitioners urge this Court to resolve is nonexistent. Petitioners' assertions to the contrary are based on their mischaracterization of the Second Circuit's holding, as well as citation to an entirely consistent decision (*Byars*) and inapposite authority (*R.J. Reynolds*).

III. THE SECOND CIRCUIT'S HOLDING IS CONSISTENT WITH SUPREME COURT PRECEDENT.

The Second Circuit's decision is also completely in accord with this Court's prior authority on vertical restraints, which encompasses the exclusive distributor arrangement challenged here. Thirty years ago, in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), this Court held that a territorial restriction imposed by a franchisor on its franchisees should be analyzed under the rule of reason rather than subject to a per se determination of illegality. *Id.* at 59. The Court reasoned that "[*w*]*hen anticompetitive effects are shown to result from particular vertical restrictions* they can be adequately policed under the rule of reason." *Id.* (emphasis added).

Here, the Second Circuit addressed a question analogous to that in *Continental T.V.*: the legality of Doman's decision to sell its products in a specified geographic area through a

single reseller. The Second Circuit recognized that, where a plaintiff fails to allege facts that fulfill the threshold requirement set forth in *Continental T.V. — i.e., that the challenged restriction have an anticompetitive effect* — the plaintiff has failed to state a claim that is subject to review under the rule of reason. Accordingly, in light of petitioners' failure to allege facts that plausibly suggested how such an arrangement could have reduced competition in the sale of green hem-fir lumber, the court affirmed the dismissal of petitioners' amended complaint.

This Court has recently reemphasized that a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face" and, by averring such facts, "nudge[] [its] claims across the line from conceivable to plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. __, 127 S. Ct. 1955, 1974, 2007 WL 1461066 (2007). Here, petitioners have failed to allege *any* fact to support an essential element of their claim. The Second Circuit thus properly affirmed the dismissal of the amended complaint.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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